Appeal No. 01-3128 **Cir. Ct. No. 00-CV-222**

WISCONSIN COURT OF APPEALS
DISTRICT II

CONLEY PUBLISHING GROUP LTD., FREEMAN NEWSPAPERS LLC AND LAKESHORE NEWSPAPERS, INC.,

PLAINTIFFS-APPELLANTS,

V.

JOURNAL COMMUNICATIONS, INC., AND JOURNAL SENTINEL, INC.,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Nettesheim, P.J., Brown and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Whether the United States Supreme Court decision in ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.***, 509 U.S. 209 (1993), should be adopted as the law in Wisconsin governing predatory pricing practices in violation of WIS. STAT. § 133.03 (1999-2000),[1] Wisconsin's Sherman Anti-Trust Act.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

2. Whether the more stringent federal rule governing the admissibility of expert opinion testimony set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), affects the applicability of ***Brooke Group*** to Wisconsin law.

3. Whether Wisconsin's predatory pricing law requires a plaintiff to "disaggregate" its damages in order to survive summary judgment.

FACTS

Conley Publishing Group Ltd., the publisher of the *Waukesha Freeman* (the Freeman), filed this action against Journal Communications, Inc., and Journal Sentinel, Inc., the publisher of the *Milwaukee Journal/Sentinel* (the Journal). Relevant to the issues on appeal, the Freeman alleged in its second amended complaint that the Journal had engaged in an attempt to monopolize the market for readership of daily newspapers in Waukesha county in violation of Wisconsin's Sherman Anti-Trust Act, WIS. STAT. § 133.03. The trial court dismissed the Freeman's complaint at summary judgment.

We take the facts from the summary judgment record. Conley Publishing purchased the Freeman in May 1997. The Freeman, which was established in 1859, issues a paid daily newspaper (distributed Monday through Saturday) to residents of Waukesha county. It does not publish a paid Sunday newspaper.

The Freeman's only daily competitor in the Waukesha county market is the Journal, which publishes a daily newspaper and a Sunday newspaper. The Journal's daily newspaper is the only local paid daily newspaper in Milwaukee county. Its Sunday newspaper is the only local paid Sunday

newspaper in Milwaukee, Waukesha, Ozaukee and Washington counties. In Waukesha county, the Journal has controlled roughly 78% of the daily newspaper readership market while the Freeman has controlled roughly 22%.

The Freeman alleges that beginning in mid-1996, the Journal began targeting the Freeman subscribers by offering a "Sunday-daily conversion" program. This conversion program, which is the subject of the Freeman's appeal, operated as follows. The Journal hired an outside marketing company to contact residents of Waukesha county who subscribed to the Sunday Journal but not to the daily Journal. The Journal offered those subscribers the opportunity to receive the daily Journal at no additional cost for the remainder of their Sunday Journal contract provided they shorten the length of their Sunday subscription terms. According to a Journal telemarketing transcript submitted at summary judgment, the Journal would offer a fifty-two week Sunday only subscriber forty-nine weeks of the daily Journal by agreeing to shorten the Sunday subscription term to forty-nine weeks as well. The Journal's 1997 Marketing Plan expressly states its plan to "target non-subscribers within [Waukesha] zip codes 53183, 53186, and 53188, which will include the majority of remaining Freeman subscribers."

An affidavit of the Freeman's publisher, Jeffrey Hovind, summarizes the Freeman circulation levels from 1996 to present. He states that for the ten years prior to 1996, the Waukesha Freeman's circulation remained relatively constant at around 22,000 subscribers. At the beginning of 1996, the Freeman had 21,424 subscribers. By the end of 1997, its circulation had declined to 17,466. During 1998, the only year the Journal did not offer a Sunday conversion program, the Freeman gained subscribers. The Freeman presently has a circulation of approximately 15,900 subscribers.

The result of the Freeman's decline in circulation was a decline in advertising revenue. The Freeman quantifies these losses as approximately $1,108,800 from the time it acquired the Freeman in 1997 until the present.

The Freeman alleged that the Journal's Sunday-daily conversion program constituted predatory pricing that will eventually allow the Journal to monopolize the daily newspaper market in Waukesha county. The Freeman engaged an expert, Dr. Frank Gollop, who determined that both requirements of a predatory pricing scheme are present: (1) the Journal was supplying daily papers to Waukesha county subscribers for less than the relevant measure of cost and (2) once the Journal drives the Freeman out of business it will have a monopoly in Waukesha county and will be able to recoup.

The Journal requested summary judgment on grounds that the Freeman had failed to offer sufficient evidence and expert testimony to support its antitrust claims and had failed to segregate its damages relating to those claims as required by antitrust laws. Specifically, the Journal argued that Gollop had failed to consider whether increased circulation and advertising revenue streams could exceed the "costs" of the Sunday-daily conversion program. However, at his deposition, Gollop testified that he had concluded that the advertising discounts also involved a sale below costs and, therefore, constituted predatory pricing.

As to damages, the Journal argued that the Freeman's damages expert, Carl G. Degen, erred in basing his calculations of declining Freeman subscriptions solely on the Journal's Sunday-daily conversion program. The Journal pointed to several other factors which could have contributed to the Freeman's declining circulation, including a nationwide decrease in afternoon newspaper circulations, the Freeman's increased subscription prices as of 1995

and reduced number of discounts, and the turnover in senior management when the Freeman was sold to Conley Publishing in 1997.

The trial court granted the Journal's motion for summary judgment based on its determination that the Freeman had failed to provide sufficient evidence (1) to support its predatory pricing claim, (2) to support a finding on the amount of damages attributable to the Journal's alleged antitrust behavior, and (3) to support a finding that the Journal's conduct resulted in the Freeman's loss or injury. The Freeman appeals.

DISCUSSION

1. Predatory Pricing Law and Brooke Group

The Freeman's allegations amount to a predatory pricing claim under WIS. STAT. § 133.03(2), which is modeled after 15 U.S.C. § 2 (2001), the federal Sherman Anti-Trust Act. Section 133.03(2) provides:

> Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000 or imprisoned for not more than 7 years and 6 months or both.

We are not aware of, nor have the parties cited to, any Wisconsin law governing predatory pricing claims under WIS. STAT. § 133.03(2). However, we recognize Wisconsin's policy of conforming our antitrust decisions to those of the United States Supreme Court. ***Prentice v. Title Ins. Co. of Minn.***, 176 Wis. 2d 714, 724, 500 N.W.2d 658 (1993). The seminal case addressing predatory pricing at the federal level is ***Brooke Group***.

A predatory pricing claim arises when a "business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." ***Brooke Group***, 509 U.S. at 209. In order to succeed on a claim of predatory pricing, a plaintiff must prove (1) that the defendant's prices are below an appropriate measure of its rival's costs and (2) that the defendant had a reasonable prospect of recouping its investment in below-cost prices. ***Id***. at 222, 224. To demonstrate a reasonable prospect of recoupment, the plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on predation, including the time value of the money invested in it. ***Id***. at 225.

The Journal relies on the two elements set forth in ***Brooke Group*** in support of its argument that the Freeman has failed to make a prima facie case of predatory pricing. While the first element of a predatory pricing claim existed prior to the ***Brooke Group*** decision, the recoupment element was added by that decision, thereby establishing a new framework for predatory pricing analysis. The Court stated in ***Brooke Group***:

> As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," [***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 589 (1986)], and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition … mistaken inferences … are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"

Brooke Group, 509 U.S. at 226-27. The result of the Supreme Court's decision in ***Brooke Group*** has been to make rare the litigation of predatory pricing claims.

The requirements of the ***Brooke Group*** decision have been subject to criticism in recent years, raising a question as to whether it provides the proper benchmark for Wisconsin predatory pricing law. Seven years post-***Brooke Group***, commentators observed:

> Predatory pricing poses a dilemma that has perplexed and intrigued the antitrust community for many years. On one hand, history and economic theory teach that predatory pricing can be an instrument of abuse; on the other hand, price reductions are the hallmark of competition and the tangible benefit that consumers perhaps most desire from the economic system.
>
> The dilemma is intensified by recent legal and economic developments. Judicial enforcement is at a low level following the Supreme Court's most important predatory pricing decision in modern times [***Brooke Group***]. Indeed, since Brooke was decided in 1993, no predatory pricing plaintiff has prevailed on the merits in the federal courts.

Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000). The article goes on to note that while ***Brooke Group*** was decided at a time when predatory pricing conduct was thought to be irrational, the consensus view in modern economics is that predatory pricing can be a successful and fully rational business strategy—a development that the courts have "failed to incorporate … into [modern] judicial decisions, relying instead on earlier theory that is no longer generally accepted." Bolton, *supra* at 2241.

Specifically, it is ***Brooke Group***'s addition of the "recoupment" element of a predatory pricing claim that renders it nearly impossible to succeed on a predatory pricing claim. ***Brooke Group*** instructs that proof of recoupment requires a showing that (1) the scheme alleged would cause a rise in prices above a competitive level and (2) that such a rise would be sufficient to compensate for the

amounts expended on predation, including the time value of the money invested in it. ***Brooke Group***, 509 U.S. at 225.

Leading antitrust commentators have observed that the proof necessary to establish the second clause of recoupment has yet to be determined. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW 274, ¶726d4 (rev. ed. 1996). ***Brooke Group*** did not reach the issue of whether it requires proof not only of significantly supracompetitive prices, actual or prospective, but also of the amount and duration of that pricing. AREEDA & HOVENKAMP, *supra* at 274, ¶726d4. If, however, proof of amount and duration were required, it would be impossible to produce such detailed accounting. ***Id***. Regardless, commentators have noted that the stringency of the recoupment requirement goes well beyond that required in other areas of antitrust law—"only the law of predatory pricing exacts its much more strenuous 'recoupment' requirement." ***Id***. at 247, ¶725a1B.[2]

Noting the criticism of ***Brooke Group*** and the near impossibility of surviving summary judgment with a claim of predatory pricing, the Freeman urges this court to follow pre-***Brooke Group*** law, which requires only a showing that the competitor is selling below cost.

We certify this issue not only because there is no law in Wisconsin governing a claim of predatory pricing under WIS. STAT. § 133.03, but also because of the recent criticism of ***Brooke Group*** and the apparent impossibility of maintaining a claim of predatory pricing under its requirements. We believe that

[2] We note that the recoupment approach may be favored in cases in which, as here, the relevant market consists of a predator who is driving out its only rival—thus having a recoupment market share of 100%—and the market has a low elasticity of demand. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW 249, ¶725b (rev. ed. 1996).

our supreme court should determine the direction of Wisconsin law given the important policies underlying claims of predatory pricing and the equally important policies of protecting competition.

2. Brooke Group and the Trial Court's Role at Summary Judgment

The trial court found at summary judgment that the Freeman's expert, Gollop, failed to provide sufficient evidence as to (1) "the material issue of whether or not the total advertising revenue … [a]s folded into the price of the paper is below the cost to either the Journal or its competitor [the Freeman]," (2) whether "this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman," and (3) the "probability as to what the costs of the Journal are respecting its investment in … below cost pricing." The court further determined that the Freeman had failed to show (1) that the Journal would at some future date be charging higher prices for its paper, (2) that the Journal has or will suffer a loss as a result of the Sunday-daily conversion program, and (3) what amount the Journal will need to recoup for its losses.

The Freeman challenges the trial court's grant of summary judgment on grounds that the trial court usurped the function of the jury by weighing conflicting expert testimony regarding recoupment. The Freeman argues that Gollop's testimony was sufficient to raise a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program involved a price below the relevant measure of cost. The Freeman argues that "in Wisconsin, when qualified experts disagree, summary judgment is not appropriate."

The Journal relies heavily on ***American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.***, 135 F. Supp. 2d 1031 (N.D. Cal. 2001), in support of its

argument that the trial court may grant summary judgment based on its determination that an expert's opinion is inadequate as a matter of law. There, the plaintiffs alleged a violation of the Robinson-Patman Act by the defendants. ***Id***. at 1035. The court granted summary judgment in favor of the defendants after concluding that the expert's model of damages contained "entirely too many assumptions and simplifications that are not supported by real-world evidence. As a result, its conclusions that the discounts defendants received caused actual injury to the individual plaintiffs, and the amount of damages caused by that injury, are entirely too speculative to support a jury verdict." ***Id***. at 1041-42.

However, the role of the Wisconsin trial court in evaluating expert testimony differs from that of the federal court. This difference was recently discussed in ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶21, 238 Wis. 2d 477, 617 N.W.2d 881, *aff'd*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727:

> Unlike in the federal system, where the trial court has a significant "gatekeeper" function in keeping from the jury expert testimony that is not reliable, *see, e.g.*, ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993) (scientific expert testimony); ***Kumho Tire Co. v. Carmichael***, [526 U.S. 137] (1999) (expert testimony in general), the trial court's gatekeeper role in Wisconsin is extremely limited[.]

In Wisconsin, the witness must be first qualified as an expert under WIS. STAT. § 907.02 before he or she can give any opinion within the asserted area of expertise. ***Green***, 2000 WI App 192 at ¶21. "Once the relevancy of the evidence is established and the witness is qualified as an expert, *the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment.*" ***State v. Peters***, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App.

1995) (emphasis added). Where, as here, the parties do not dispute the expert's qualifications or the relevancy of the testimony, Wisconsin law appears to favor leaving the reliability issues to the jury.

We certify this issue because federal antitrust case law invokes the ***Daubert*** "gatekeeper" role of the trial court regarding expert testimony, and our supreme court has instructed the courts of this state to conform Wisconsin antitrust law to federal law. ***Prentice***, 176 Wis. 2d at 724. Yet, at the same time, Wisconsin does not operate under the ***Daubert*** rule. ***Green***, 2000 WI App 192 at ¶21. We believe that the supreme court is the proper judicial forum to resolve the tension between these two principles. In addition, the case presents the supreme court with the opportunity (or perhaps necessity) of revisiting the Wisconsin rejection of the trial court's "gatekeeper" function under ***Daubert***. The supreme court may choose to do so either on a broad scale or on a limited basis in antitrust cases.

3. "Disaggregation" of Damages

Finally, the Freeman challenges the trial court's reliance on the "disaggregation" of damages doctrine in granting summary judgment. As to proof of damages, the trial court held, pursuant to ***MCI Communications Corp. v. American Telegraph and Telephone Co.***, 708 F.2d 1081 (7th Cir. 1983), that there must be a disaggregation of damages in order to survive a motion for summary judgment. The court noted that the Freeman's expert had indicated a significant loss of revenue as a result of lost subscriptions and advertising dollars due to the Journal's anticompetitive conduct. However, the trial court determined that the Freeman's expert had made no effort to disaggregate the damages so as to raise a factual dispute as to what portion of damages was attributable to

anticompetitive behavior as opposed to other factors such as poor business decisions made by the Freeman.

In ***MCI Communications***, the court stated: "When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of 'speculation or guesswork' not permitted for antitrust jury verdicts." ***Id***. at 1162.

The Freeman relies on ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 322, 306 N.W.2d 292 (Ct. App. 1981), for the proposition that, under Wisconsin law, a plaintiff may prove causation if it shows that the defendant's conduct was a "substantial factor" in causing injury.

> In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No.

Id. (citation omitted). The Freeman contends that Wisconsin law does not require it to disaggregate its damages by separating out those caused by anticompetitive behavior and those resulting from other factors. The Freeman argues that a more stringent requirement would run contrary to Wisconsin's policy that WIS. STAT. § 133.03 is to be given "the most liberal construction to achieve the aim of

competition." ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 662, 529 N.W.2d 905 (1995); WIS. STAT. § 133.01.

We certify this issue because there is no law governing the allocation of damages in a predatory pricing action under WIS. STAT. § 133.03. While we agree with the Journal that the Freeman cannot recover unless there is a causal connection between the conduct and the injury and an actual loss or damage as a result of the injury, *see* ***Martindale v. Ripp***, 2001 WI 113, ¶33, 246 Wis. 2d 67, 629 N.W.2d 698, it remains unclear whether the damages must be disaggregated once a causal connection and actual loss are established.

CONCLUSION

We have precious few Wisconsin appellate decisions addressing the Wisconsin antitrust statute. More importantly, we have no Wisconsin predatory pricing cases. All of the questions we certify raise issues of first impression which will chart new law under Wisconsin's antitrust statute. We respectfully ask the supreme court to accept jurisdiction over this case.